Appendix D: Supplemental Research (Judith Wegner, 2/3/16)

Introduction

This Appendix distills additional information relating to legal precedent and associated materials that may prove helping in determining how best to proceed in addressing issues relating to tenancy by the entireties in North Carolina and the legalization of same-sex marriage following the June 2015 United States Supreme Court decision in *Obergefell v. Hodges* (recognizing rights to same-sex marriage as a constitutional matter) and related lower federal court decisions affecting North Carolina.

The Appendix seeks to achieve three major goals. First, it attempts to illuminate the nature and special importance of holding property in the form of tenancy by the entireties so that this form of concurrent ownership and its importance can be better understood by North Carolina legislators and lay people. Second, it positions North Carolina's historical practices against the broader national landscape in order to illustrate how North Carolina has resisted national trends to diminish the role of tenancy by the entireties and has maintained a long-term commitment to preserve this form of concurrent ownership as a means of protecting families. Finally, it considers the risks to North Carolina families and stability of land titles more generally if the state waits to adopt technical revisions to its tenancy by the entireties statutes and instead waits for judicial resolution of current ambiguities in the aftermath of recent federal court decisions relating to the rights of same-sex married couples.

A. Basic Concepts: Concurrent Ownership and Related Strategies

To begin, it is worth explaining the notion of "concurrent interests" in general and "tenancy by the entireties" in particular because the concept is probably not well-known to most lay people.

There are three principal ways in which real property is typically held by two or more persons "concurrently," that is, at the same present moment (rather than with one holding a present interest and another holding and interest in the future). These three methods are referred to as "tenancy in common," "joint tenancy with right of survivorship," and "tenancy by the entireties" (a form that is reserved to married couples).

1. *Tenancy in common*. The most general form of concurrent ownership is called "tenancy in common." For example, multiple (perhaps three) children might receive equal shares in the family home place under a parent's will. They would each have equal (1/3) shares, but at the same time each would be entitled to make full use of all the property. Each child could sell his or her share to someone else without the other co-owners' permission, and each could leave the share to someone else at the time of death. Each share could also be reached by an individual child's creditors. If the children decided that they wanted instead to create individually held assets during their lifetimes, they could file a "partition" action asking the court to divide the property into three separate subsidiary parcels each to be held individually, or arrange for the property to be sold and the proceeds split three ways.

2. *Joint Tenancy with Right of Survivorship*. "Joint tenancy with right of survivorship" is a means by which concurrent rights to property can be secured for concurrent owners during their shared lifetimes (as is true for tenants in common), but with the anticipation that, if no other steps are taken, the rights of the first to die dissolve at death, leaving full rights to the other co-owners who survive the decedent. Assuming two co-owners for this example, either could sell their interest or have their creditors make claims that could "sever" the shared interest and turn the form of ownership into the form of concurrent ownership known as "tenancy in common," accordingly defeating the original "survivorship" plan. If, however, the co-owners maintained their original plan until the death of one of them, the other would be legally entitled to all interest in the parcel following the first's death,

without going through probate. This form of concurrent ownership might be used by unmarried couples or siblings who would employ it not only as a form of shared ownership during life, but also as a simple approach to estate planning. Note, however, that one concurrent owner's expected rights at the death of the other could be defeated by action during the other's lifetime (should the other sell their own interest to someone else or pledge that asset to creditors). In that case, the first co-tenant would still retain a 50% interest following the other's death, but not the 100% interest originally anticipated. There were historical standards about circumstances ("unities) required for the creation of joint tenancies, but most of those historic rules no longer apply.

3. *Tenancy by the Entireties*. "Tenancy by the entireties" is a distinctive form of concurrent ownership historically available only to married couples (until recent legal developments, only to a legally married "husband and wife"), assuming that they met certain "unity" requirements. Unlike the other two forms of concurrent ownership discussed above, property held "by the entireties" is seen to be held by the married couple as a distinct entity (not by each spouse separately, but by the two of them together as a single married unit). As a result, such property can only be sold or pledged to creditors if both spouses act together to approve the action. The shared interest, held by the couple as a unified entity, cannot be destroyed by the action of only one of the two individuals married to each other. As discussed below, this form of concurrent ownership was seen as problematic at some times in history when only the husband had rights to manage and draw revenue from the concurrently owned property. North Carolina remedied that inequality by legislation in the early 1980's, while a number of other states abolished tenancies by the entireties altogether, substituting joint tenancy as the closest alternative for married couples.

In contrast to many other states, North Carolina has long valued tenancy by the entireties as a means of protecting families and their shared assets, and has even created a statutory presumption that land titles taken by married couples should be deemed to be held in "tenancy by the entireties" absent evidence to the contrary. According to expert title insurers, the vast bulk of real property held for residential purposes in North Carolina either is or at some recent time has been held in this form of concurrent ownership. If "tenancy by the entireties" was no longer available in North Carolina, there were be a profound destabilization of families, their expectations, and land titles around the state.

B. <u>North Carolina's Commitment to Tenancy by the Entireties and Practices in Other States</u>

1. *North Carolina's Deep Commitment to Tenancy by the Entireties*. North Carolina has tended to hew to traditional British property law principles with greater tenacity and longer endurance than nearly all other states (Massachusetts is a close second). Several features of North Carolina law illustrate this commitment. By statute, North Carolina provides that presumptively property acquired by a married couple is taken in the form of tenancy by the entireties absent contrary evidence. See NC GS § 39-13.6 (creating presumption that property is held by husband and wife as tenants by the entireties). North Carolina did not interpret its Married Women's Property Acts (and related provisions in the state constitution) as abolishing tenancy by the entireties (as did some other states such as South Carolina, discussed below). Instead, it was only in 1983 that the North Carolina General Assembly amended state statutes to provide explicitly that husband and wife had equal rights to manage property held by the entireties (rather than maintaining the long-standing historical rule that the husband alone had such prerogatives). See NC GS § 39-13.6; K. Edward Greene, *A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?* 18 Campbell L. Rev. 203 (1996). Moreover, North Carolina continues its long-

standing tradition of protecting property held by the entireties against claims by individual creditors of either spouse. See 1-7 Webster's Real Estate Law of North Carolina, §§ 7.04, 7.15-19 (discussing nuances of North Carolina law). As noted below, many other jurisdictions have (a) never allowed married couples to hold property as "tenants by the entireties" (for example, community property states), (b) concluded that tenancies by the entireties were abolished implicitly by adoption of Married Women's Property Acts (that concluded that both husbands and wives could manage property held on a concurrent basis), or (c) determined that creditors of one spouse can in some fashion reach assets held by that spouse as part of a married couple with property held in the form of tenancy by the entireties. In short, North Carolina has a deep and long-standing commitment to treating tenancy by the entireties as a significant and preferred form of concurrent property ownership because our state understands this legal framework as one that significant protects North Carolinians' families and family assets. For further discussion of tenancy by the entireties in North Carolina and elsewhere, see 1-7 Webster's Real Estate Law of North Carolina, §§ 7.04, 7.15-19 (discusses nuances of North Carolina law).

2. Other States' Treatment of Tenancy by the Entireties.

In assessing other states' practices, it should first be noted that a number of states with Spanish or French traditions do not recognize the notion of "tenancy by the entirety" at all because they instead rely on systems of "community property" that make the notion of "tenancy by the entireties" irrelevant (e.g., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

A number of other states have abolished the option to hold real estate in the form of "tenancy by the entireties" most commonly in the aftermath of adopting Married Women's property acts (abolishing the option to hold real estate in this form at the time when these acts specified that husbands could not solely control the management and revenues from property held in this form. See *Married Women's Acts as Abolishing Tenancy by the Entireties*, 141 A.L.R. 179. South Carolina is one of the states that is particularly pertinent to North Carolina (given their shared border). *Davis v. Davis*, 75 S.E.2d 46 (SC 1953); SC statutes subsequently abolished tenancy by the entireties. The attached statutory compendiums of state statutes provides some guidance on how the varying states have dealt with tenancies by the entireties, but it is not easy to summarize state practices, so sources should be carefully assessed (Lexis statutory survey November 2014; Westlaw statutory survey May 2015). Note that the US Supreme Court did not rule on the obligation to recognize same-sex marriage until June 2015.

State practices vary regarding continued recognition of tenancy by the entireties. Some states have abolished this form of concurrent ownership altogether. Some have modified presumptions regarding how ambiguities in title are resolved. Some have extended rights of individual creditors to assert claims against assets held by one of the spouses in "tenancy by the entireties." Some statutes have modified practices with an eye to when property is acquired. Key treatises provide further information on these nuances. See, e.g., 7-52 Powell on Real Property § 52.01 (includes references to differences among states and related legislation); 4-33 Thompson on Real Property, Thomas Edition, § 33.06 (includes extensive discussion of nuances of differences between states that recognize tenancy by the entireties, including statutory citations). Statutory compendia are also helpful in assessing other states' practices, although it is often difficult to track such nuances in simple charts. For example, it is helpful to review recent surveys of state statutes available through Westlaw (dated May

2015) and Lexis (dated November 2014. Each of these compendia provides a helpful update on statutory practices that should be read in conjunction with the treatises just referenced (which point out additional nuances not necessarily capture in statutes). Copies are attached.

Based on these surveys, the following states appear to recognize tenancy by the entireties by statute using the terms referenced: Alaska ("husband and wife"); Delaware ("between spouses"); District of Columbia ("spouses or domestic partners"); Florida (references both "husband and wife" and "spouse"); Hawaii ("certain persons"); Illinois ("husband and wife"); Indiana ("husband and wife"); Maryland ("husband and wife"); Massachusetts ("spouse"); Michigan ("husband and wife"); Mississippi ("to himself, themselves, or others"); Missouri ("tenancy by the entireties are recognized" and references "husband and wife"); New Jersey ("civil union couples" may hold in tenancy by the entireties); New York ("husband and wife"); North Carolina ("husband and wife"); North Dakota (parties "married to each other"); Ohio (prior to joint tenancy statute only); Oklahoma ("husband and wife"); Oregon ("husband and wife"); Pennsylvania (slayer statute); Rhode Island ("husband" and "wife"); Tennessee ("married person" can convert to "his/her spouse"); Utah ("tenancy by entirety" is considered "joint tenancy"); Vermont ("tenancy by the entirety" is recognized); Virginia ("husband and wife"); Virgin Islands ("husband and wife"); West Virginia (treated as tenancy in common at death unless joint/survivorship intended); Wyoming ("may be created").

C. Assessing Risks to North Carolina's Tenancy by the Entireties Policy in the Aftermath of *Obergefell*

1. State Court Judicial Decisions to Date

a. *Case Law*. At least 20 states struck down denials of same-sex marriage prior to the United State Supreme Court's decision in *Obergefell* (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia). Not all those states had continued to recognize tenancy by the entireties at the time of their decisions, and some instead relied upon community property concepts as an alternative legal structure for married couples to hold property.

In jurisdictions that have continued to recognize tenancy by the entireties, the failure to extend such rights of ownership to same-sex couples played an important role in striking down denials of same sex marriage because of associated denials of property rights. See *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 955 (MA 2003); *Lewis v. Harris*, 908 A2d. 196, 215 (NJ 2006) (citing denial of equal treatment with regard to tenancy by the entireties as basis for finding denial of same-sex marriage rights as unconstitutional under state constitution); *Kitchen v. Herbert*, 755 F.3d 1193, 1211 (10th Cir. Utah 2014) (citing denial of rights to hold property in tenancy by the entireties as one basis for finding state prohibition on same-sex marriage to be unconstitutional); *Latta v. Otter*, 2014 U.S. App. LEXIS 19620, 1, 39 (9th Cir. Idaho, 2014) (citing denial of rights to hold property in tenancy by the entireties as one basis for finding state prohibition on same-sex marriage to be unconstitutional); *State v. Schmidt*, 323 P.3d 647, 661 (Alaska 2014) (striking down municipal program of property tax exemptions that did not extend rights to same-sex married couples, citing unequal access to hold property as tenants by the entireties). *See also Hernandez v. Robles*, 7 N.Y.3d 338, 385 (C.J. Kaye, dissenting, citing unequal treatment of access to holding property in tenancy by the entirety); *Conaway v. Deane*, 401 Md. 219, (Ct. App., 2007) (Battaglia, J., dissenting, same).

b. Alternatives for Heterosexual or Same-Sex Married Couples in the Absence of Tenancy by the Entireties?

It is important to assess whether forms of concurrent ownership (other than tenancy by the entireties) provide equivalent protection to rights provided to married property owners. There are not easy equivalents to protections provided by rights in the form of tenancies by the entireties.

i. *Traps for the Unwary: Problems of "Work Arounds" to Achieve the Same Effect as Tenancy by the Entirety.* Once again, South Carolina provides an object lesson. Following the determination that tenancy by the entirety had been abolished in South Carolina as the result of adoption of the Married Women's Property Act, it became necessary to engage in work-arounds in order to approximate the equivalent of a tenancy by the entirety. *Smith v. Cutler*, 366 S.C. 546 (S.C. 2005) provides a sad tale and an object lesson. There a woman of nearly 80 married a man of nearly 70. Shortly after their marriage, she sought to transfer her home property to be shared with him. The South Carolina courts had recognized a method of holding property that approximated tenancy by the entirety, namely a shared life tenancy and a remainder in the survivor, but had also recognized by statute joint tenancy with right of survivorship (that would have allowed one of the property owners to sever the joint tenancy in order to defeat the survivor's full right to the remaining property upon one owner's death). The case involved a claim by the elderly husband's son to sever the property in order to help pay for his nursing home care, and the efforts of the original property owner (the wife of the elderly man) to preserve her survivorship rights. The case is widely recognized as a trap for the unwary, since lawyers or couples may not be aware of the "magic language" that needs to be used to differentiate between a severable joint tenancy and a non-several joint life estate with firm remainder in the survivor.

ii. *Observations by Treatise Writers.* One of the major treatise writers, 4-33 Thompson on Real Property, Thompson §33.06, states that "North Carolina lawyers have been laboring to determine how best to create the equivalent of a tenancy by the entirety for same-sex married couples. There is real risk of confusion or misinterpretation of client intentions if tenancy by the entirety is not made available on an equivalent basis for all." There is really no equivalent to tenancy by the entireties at common law, since even if the parties create a concurrent life estate and contingent remainders tied to survival in fee simple absolute, there are uncertainties about how future contingencies might play out. South Carolina cases, referenced provide object lessons.

c. <u>Risks from Litigation Relating to Tenancy by the Entireties and Same-Sex Marriage in North Carolina.</u>

i. *Equal Protection Issues: Are Gender Differences and Sexual-Orientation Differences Comparable?* In *Obergefell*, the U.S. Supreme Court treated the right to marry as a fundamental right and accordingly applied a higher level of scrutiny to strike down prohibitions on same-sex marriage. Would a similarly high standard of scrutiny be used in reviewing tenancy by the entirety provisions that privilege heterosexual married couples compared to those in same-sex marriages? One example worth considering again arose in South Carolina. In *Boan v. Wilson*, 281 S.C. 516, the South Carolina Supreme Court struck down common law dower protections that extended only to widows (not to widowers) prospectively. If treatment of heterosexual marriage rights (such as tenancy by the entirety) is deemed to be unwarranted insofar as such rights are not extended to same-sex married couples, there is a risk that tenancy by the entirety rights could be struck down as well.

ii. *Practitioner Insights*. In my ongoing research, I have found a number of articles by practitioners from states that had recognized the legality of same-sex marriage before *Obergefell*. These articles have tended to assume that rights to hold real estate in tenancy by the entireties would in fact be extended to same-sex married couples as a matter of course, in response to earlier litigation in their jurisdictions. Strikingly, however, these writers recognize that statutory codification of rights is still desirable in the interest of stabilizing land titles. See, e.g. David M. Dolbashian, Civil Unions and Real Estate: How One Little Word Can Cause so Many Problems, 61 RI Bar Jnl. 15 (2012) (discussing impact of Rhode Island "civil unions" legislation and need for statutory clarification regarding tenancy by the entireties); See Arlene Zaremka, Advising Same-Sex Couples After Windsor, 32 GPSolo 34 (2015) (noting that statutory reform is still needed for clarity).

Conclusion. I hope that this additional research proves helpful to colleagues on the General Statutes Commission and on the Working Group that is exploring needed statutory reforms. I hope to continue to conduct research in this area and if there are particular questions that should be answered, invite anyone interested to bring them to my attention.